

ATTACHMENT A

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

ZITO MEDIA, L.P.,

Complainant,

v.

PENNSYLVANIA ELECTRIC COMPANY,

Respondent.

File No.

DECLARATION OF JAMES RIGAS

I, JAMES RIGAS, declare as follows:

1. I serve as Co-President of Zito Canton, LLC (“Zito”), with a general office address of 102 South Main Street, Coudersport, PA 16915. I make this Declaration in support of Zito’s Pole Attachment Complaint in the above-captioned case. I know the following of my own personal knowledge, and if called as a witness in this action, I could and would testify competently to these facts under oath.

2. I have served as Co-President for 11 years. In this role, I am responsible for managing all aspects of Zito’s business, including sales, marketing, operations, and business planning.

3. I have reviewed the allegations made in the Pole Attachment Complaint filed in this proceeding as well as the exhibits attached hereto and verify that they are true and correct to the best of my knowledge, information and belief.

4. Zito provides cable television, telecommunications services and broadband internet access to businesses and residents in Pennsylvania. Zito and its affiliates have constructed a fiber-optic network in 110 communities throughout 17 states. This fiber-optic network supports the provision of mobile backhaul and other high-speed services (including data, video, voice, and advanced E911 service) to businesses, households, public safety agencies and other critical community organizations and institutions. The areas served by Zito and its affiliates generally are unserved or underserved rural communities, many of which are economically depressed.

5. To construct its network in Pennsylvania, Zito requires access to poles owned or controlled by Pennsylvania Electric Company (“Penelec”).

6. As required by the parties’ Agreement, when Zito seeks to attach facilities to Penelec poles, Zito submits a pole attachment application and Pole Profile sheets to Penelec. The application and Pole Profile sheets include information about the nature of the attachments as well as the particular poles to which attachment is sought, including the height and class of the pole and existing facilities on the pole.

7. Starting in early 2015, Zito began to experience significant delays in connection with its pole attachment applications to Penelec. Penelec consistently failed to meet the timeframes prescribed by the Federal Communications Commission (“Commission”) rules for conducting its application review and pre-attachment survey and providing make-ready cost estimates to Zito and completing make-ready work.

8. Zito repeatedly expressed its concerns to Penelec about the excessive delays, which in turn delayed Zito’s ability to timely deploy its network on critical projects.

9. Penelec's inability to comply with the Commission's prescribed application review, pre-attachment survey and make-ready timeframes with respect to Zito's pole attachment applications continued throughout 2016.

10. After Zito requested that Penelec provide Zito with a list of approved contractors to conduct the pre-attachment inspection and engineering process on Zito's outstanding applications for attachment to Penelec's poles, Penelec informed Zito that it had hired Sigma Technologies ("Sigma") to process all of Zito's applications for attachment to Penelec's poles in its territory North of Interstate 80 (I-80). In Penelec's territory South of I-80, Penelec continues to process Zito's applications without the use of a contractor.

11. Upon information and belief, Penelec charges Zito for the full cost of the application review and pre-attachment survey conducted when Zito submits its applications to Penelec. Penelec did not allow Zito to participate in the selection of the contractor hired to perform this work or to provide input into the terms and conditions governing the scope or price of Sigma's work. Neither Penelec nor Sigma has provided Zito with a price sheet or schedule of charges regarding the work Sigma performs, nor is such information publicly available.

12. Even after hiring Sigma, Penelec still is not meeting the Commission's prescribed timeframes for conducting the pole attachment application review and pre-attachment survey and providing make-ready cost estimates.

13. Additionally, Sigma's charges for the pre-attachment survey process far exceed the costs charged by other pole owners in Pennsylvania for pre-attachment survey work. Upon information and belief, Sigma makes decisions about required make-ready work without taking into account information provided by Zito. In addition, the estimates lack sufficient information

about the make-ready work to be performed and attendant cost information to enable Zito to determine whether the charges are reasonable.

14. I participated in telephone conference calls among representatives of Zito and Penelec on May 1, June 7, and June 22, 2017, during which Zito expressed its concerns to Penelec about Sigma's inefficient, unreasonable, and unreasonably costly application process and estimates. I also attended an in-person meeting among representatives of Zito and Penelec in Erie, Pennsylvania on July 25, 2017, where Zito again expressed the same concerns. One representative from Sigma was also present at the meeting, but did not contribute to the dialogue in any meaningful way.

15. During these calls and meetings, Zito explained to Penelec that Sigma's refusal to accept Zito's Pole Profile Sheets (as Penelec does for Zito's applications South of I-80) and instead its collection of information during the survey process that is not necessary to process Zito's application or that otherwise benefits Penelec and not Zito, results in undue delays and excessive charges.

16. Zito also explained to Penelec that Sigma's refusal to participate in a joint ride-out (or sending inexperienced personnel on the one joint ride-out that was conducted) drives up costs and results in inefficient and costly make-ready work.

17. Zito also explained to Penelec that Sigma's estimates included no supporting detail and that Zito was unable to approve those charges without knowing what they represented. Zito specifically requested that the estimates be substantiated.

18. Zito also asked to make temporary attachments on the poles where the applications had exceeded required deadlines and for which Zito had time-sensitive deployment projects.

19. On September 8, 2017, I sent a letter to Stephen F. Schafer (Manager, Joint Use & Cable Locating for Penelec) reiterating Zito's concerns about the pre-attachment survey and engineering process and charges imposed by Penelec and inviting Penelec to reconsider Zito's compromise solution, provide the requested detailed make-ready information, and allow Zito to make temporary attachments. *See* Exhibit 1.

20. By letter dated September 20, 2017, Mr. Schafer responded to me, setting forth Penelec's purported understanding of and response to Zito's concerns. *See* Exhibit 2. The letter specifically acknowledged Zito's repeated requests for more detailed information concerning charges for the pre-attachment survey and engineering process and make-ready work and admitted that Sigma's estimates still "falls short of a pole-by-pole, piece-by-piece accounting." *Id.* Ultimately, however, Mr. Schafer's letter did not offer any reasonable compromise solution acceptable to Zito.

21. On October 5, 2017, I responded to Mr. Schafer, specifically detailing Zito's disagreement with Mr. Schafer's attempts to re-characterize Zito's concerns and rejecting Penelec's suggestion that certain issues had been resolved or could be resolved on Penelec's unreasonable terms and conditions. *See* Exhibit 3.

22. To date, the parties' dispute remains unresolved.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct to the best of my knowledge.

By: 
James Rigas

Dated: November 9, 2017

EXHIBIT 1

Zito Media, L.P.
102 South Main Street
Coudersport, PA 16915

September 8, 2017

Pennsylvania Electric Company
First Energy Services Company
Stephen F. Schafer
Manager Joint Use & Cable Locating
76 South Main Street A-GO-11
Akron, OH 44308

Dear Stephen:

As you know, Zito Media, L.P. (“Zito”) and Pennsylvania Electric Company (“Penelec”) have engaged in numerous discussions in an attempt to resolve their dispute concerning the pre-construction survey and engineering process and charges imposed by Penelec in connection with Zito’s applications to attach facilities to Penelec poles located North of I-80. Specifically, as we have discussed, Penelec’s requirement that Zito use Sigma, a third party contractor, to perform pre-construction engineering surveys in connection with Zito’s pole attachment applications is resulting in untenable build-out delays and excessive engineering and make-ready expenses for Zito, contrary to governing Federal Communications Commission (FCC) rules and policy objectives. In addition, Penelec’s unreasonable refusal to allow Zito to continue attaching facilities using temporary extension arms until all of Sigma’s estimated make-ready charges are paid, despite Sigma having provided no detail to substantiate the costly estimates, constitutes an unlawful denial of access. Despite multiple attempts by the parties to resolve this dispute during executive level discussions, Zito and Penelec have yet to reach a resolution and it is becoming increasingly clear that a resolution is not possible without FCC involvement.

In the parties’ multiple phone calls and email correspondence, Zito has communicated to Penelec its concerns about Sigma’s unacceptably inefficient pre-construction survey process and excessive charges for the surveys as well as the unreasonably high make-ready work estimates resulting from the surveys. Sigma’s

engineering surveys involve multiple stages of independent review by inexperienced personnel without incorporating survey work already performed by Zito's experienced field technicians. Sigma also appears to be using the survey process to collect more data than is necessary for the evaluation of Zito's pole attachment applications including data that should already be in Penelec's possession (although it is impossible to tell what information Sigma has collected given the lack of detail included in the SPANS notifications). FCC rules make clear that Zito alone should not bear the cost of Sigma's work to over-engineer the poles in ways that primarily benefit Penelec. Finally, it appears that Sigma is designing make-ready solutions that fail to account for less costly, more efficient alternatives and instead involves pole replacements more often than should be the case. Again, however, additional information is needed to ascertain precisely what the estimated make-ready work entails. Sigma's extraordinarily high fees and inefficiencies have seriously hurt Zito's ability to deploy its facilities and, in some cases, jeopardized Zito's obligations to meet certain customer commitments, including establishing access to critical 911 services.

Zito has on multiple occasions offered compromise solutions to resolve this dispute, including a cooperative engineering process using data already collected by Zito in conjunction with a joint ride-out with a qualified Sigma representative to discuss and reach agreement on any work that needs to be done to accommodate Zito's attachment. Indeed, this is the process that Penelec and Zito have successfully employed for a number of years prior to Sigma's involvement, and which is still the process in a portion of Penelec's territory not covered by Sigma. As Zito has explained, and Penelec knows, such a joint ride-out process is not only safe, but it is also far more efficient and cost effective than Sigma's process. While Sigma recently agreed to participate in a joint ride-out with Zito, it did so under the condition that Zito pay \$88 per hour to cover the cost of a Sigma representative and with the caveat that Sigma would not agree to any make-ready solutions in the field (as Zito and Penelec do successfully south of I-80) but instead would use the joint ride-out as only another data point to be considered in Sigma's engineering design process.

Finally, Zito has repeatedly requested that Penelec/Sigma provide details in connection with the make-ready estimates provided to Zito. Pursuant to Penelec's process, it will not issue an invoice for make-ready work until Zito approves the estimate, and Penelec will not allow temporary attachments unless make-ready invoices have been paid in full. But Zito cannot approve an estimate without sufficient detail to understand the work to be done and the associated costs. Despite Zito's repeated requests for these make-ready details, Penelec has failed

inexplicably to provide the supporting information. A utility has “an obligation to provide a reasonable amount of information sufficient to substantiate its make-ready charges.” *See, e.g., Knology, Inc. v. Georgia Power Company*, 18 FCC Rcd 24615, ¶ 61 (2003).

Accordingly, absent specific communication to the contrary that Penelec will change its position, Zito understands that the executive level discussions between the parties have not been successful. Zito hopes that is not the case and that Penelec will reconsider Zito’s compromise solution, provide the requested detailed make-ready information, and allow Zito to make temporary attachments. However, absent specific communication from Penelec to the contrary by one week from today, next Friday September 15, Zito will consider its understanding of Penelec’s position and Penelec’s unwillingness to compromise confirmed, and Zito will move forward to initiate proceedings to protect its rights before the FCC.

We look forward to hearing from you.

Sincerely,

A handwritten signature in black ink, appearing to read "James Rigas", with a stylized flourish at the end.

James Rigas, Co-President

Zito Media, L.P.

EXHIBIT 2

Stephen F. Schafer
Manager, Corporate Joint Use & Cable Locating

September 20, 2017

Stephen F. Schafer
Manager, Corporate Joint Use & Cable Locating
FirstEnergy Service Company
76 S. Main St.
Akron, OH 44308

James Rigas
Co-President
Zito Media, L.P.
102 South Main Street
Coudersport, PA 16915

Dear Mr. Rigas,

I am in receipt of your letter dated September 8, 2017, in regard to matters relating to proposals by Zito Media, L.P. ("Zito") seeking attachment to distribution poles owned by Pennsylvania Electric Company ("Penelec"). Thank you for agreeing to extend the date of your requested response to accommodate Penelec's assistance with restoration efforts in Florida. Electric utilities across the country have been strained in the wake of Hurricanes Harvey and Irma, as more than 50,000 utility workers were deployed to the Florida efforts alone, including 900 FirstEnergy employees.

I understand your letter to request a response only if Penelec intends to agree to your demands for: 1) a change in the pre-construction survey and engineering process; 2) more detailed make-ready estimate information; and 3) temporary attachment agreements ("TAA"). If I have misconstrued Zito's position on any issue, it is my hope that you will continue discussions to correct Penelec's understanding and appreciation of Zito's concerns. Similarly, I hope that the commitments made herein will convince Zito of Penelec's desire to advance rather than terminate these discussions.

Initially, I must disagree that executive level discussions have taken place. While Penelec brought its engineering manager into discussions for the latest meeting, from our perspective it was for the purposes of explaining to each other our concerns, policies, and positions. It was my suggestion for the players to meet face-to-face in the hope that understandings may improve with more-personal interaction. More importantly, I hoped that we would pursue opportunities to brainstorm for creative solutions that meet both of our needs, and invited Sigma to attend for that purpose. I would be happy to work with you to arrange executive-level discussions if you wish.

With respect to the issue of TAAs, it is my understanding that Zito, on Friday, September 15, communicated its acceptance and agreement to pay the make-ready estimates corresponding to a number of current pending proposals. As we have said all along, TAAs are rarely extended at Penelec, and payment of make-ready estimates is a pre-condition that is applied across the board for every attacher to whom the courtesy of project-specific TAAs are offered. Unless you have new issues regarding the terms and conditions, upon receipt and processing of your check, Penelec will review your request for additional temporary attachments under the terms and conditions of the existing TAA. With approval of acceptable temporary-attachment locations, this issue would be considered resolved in Zito's favor.

With respect to the issue of providing more detailed cost information, several years ago Zito and Penelec had a number of conversations regarding the level of detail that can be produced by Penelec's work order / construction management system, which as you know falls short of a pole-by-pole, piece-by-piece accounting. Penelec's work order system was designed to meet its electric distribution utility construction management needs according to state and federal accounting standards. However, it is possible that Sigma may be able to provide additional details otherwise not available through the "CREWS" system used by Penelec and throughout all of the FirstEnergy utilities. I suggest we continue discussions about this issue, with Zito providing a list of the make-ready estimate details it desires, and we will compare that against the details Sigma is able to provide. Penelec will commit to pursuing opportunities to provide such details where possible.

To the extent that Zito's desire for more details is driven by its concerns over the Sigma costs that are being passed through, I would note that the costs to produce make-ready estimates have declined significantly since first employing Sigma to process Zito's numerous applications, as Penelec had predicted. Although the cost depends on the poles proposed (e.g. more complex poles require more measuring and engineering time), recent estimates are approximately 30% less to prepare than for proposals submitted just a few months ago, and well less than half of the costs initially experienced during start-up mode. However, I am completely perplexed by your assertion regarding "multiple stages of independent review by inexperienced personnel," which simply isn't true. As was explained, a Sigma field technician conducts the survey which is forwarded to the engineers to prepare estimates which are forwarded to Zito through SPANS. There are no additional stages of review.

With respect to the pre-construction survey and engineering process, I am also puzzled by your characterization of Zito's "compromise." From my perspective, Zito's position has not changed throughout these discussions. Zito, from the outset, has wanted Penelec to make real time engineering design decisions "on-the-fly" during ride outs, or to eliminate key steps from its survey process. For example, Zito suggested that Penelec should not acquire its own measurements during its survey, and just accept Zito's profile sheet measurements without verifying them. As the pole owner, it is Penelec who is responsible for ensuring the integrity of its pole plant impacting both public and worker safety, and for providing reliable electric service. Demonstrating the unreasonableness of this demand, when Penelec reversed the scenario and suggested that Zito accept Penelec's measurements without conducting its own verification, Zito declined.

And to be perfectly clear, Penelec cannot accept Zito's position that indemnification protects Penelec from liability for any injuries resulting from Penelec relying solely on Zito's profile sheets. As Zito well knows, contact with power lines means workers don't come home to their families. Penelec is answerable to the Pennsylvania Public Utilities Commission, OSHA, and its

employees for matters of safety, reliability, and condition of its assets. Penelec cannot relinquish its responsibilities as the pole owner by ceding its direct contractual relationship with Sigma over to Zito as has been requested. In discussions, Zito frequently asserted that Penelec's safety- and reliability-related process steps (such as verifying clearances) are only for Penelec's benefit. This argument is short-sighted at best, considering that Zito's desire to make use of Penelec's pole plant depends on Penelec maintaining the integrity of those very assets. Furthermore, the cost of any Penelec "betterment" is removed before make ready estimates are provided to Zito.

I would also note that despite the many conference calls prior to the face-to-face meeting that Penelec arranged, Zito for the first time voiced its opinion that poles were inappropriately selected for replacement in lieu of lower cost alternatives. Zito has had access to the "pole page" since Penelec implemented its use of SPANS nearly two years ago, showing exactly which poles require replacement to accommodate Zito's attachment. Zito was asked to provide examples of improper replacements or lower cost alternatives, and while Ms. Ragosta indicated she had such information on her computer, to date none have been provided. Penelec is happy to discuss any pole construction determination, however, a vague unsubstantiated assertion is not conducive to resolution. I'm hopeful that additional dialogue will advance our mutual understanding.

Finally, I would urge you to explore whether and how Zito can benefit from Penelec's suggestion to screen high-cost poles from your routes before submitting your proposals. From Penelec's perspective, Zito appears to be selecting routes without regard to pole conditions which is a main contributor to higher pre-construction costs. As mentioned, it takes longer to measure and design poles that are more complicated. The majority of Penelec's other attachers include recommended or suggested make-ready requirements with their proposals, and seldom drop poles or re-route paths after receiving Penelec's make-ready estimates. Zito, on the other hand, drops or re-routes a significant proportion of poles from its proposals, waiting until after Penelec has incurred costs to survey and engineer before choosing alternatives. As has been apparent in discussions and in your letter, Zito wants on-the-spot make-ready decisions that Zito then uses to alter its routes. Penelec cannot accommodate such a process and still provide engineering estimates that are both timely and properly ensure the integrity of its pole plant. Engineering is not a drive-by science.

In summary, the issue of TAAs appears to be resolved; Penelec is willing to work with Zito to provide additional make-ready cost details; and it is my hope that Zito will explore pre-proposal measures instead of demanding that Penelec compromise the safety and reliability of its pre-construction survey and engineering processes. I look forward to your response, and in the meantime, be assured that Penelec will continue its efforts to meet Zito's schedule while protecting the integrity of its electric distribution system in a manner that benefits Zito and its customers.

Sincerely,



Stephen F. Schafer
Manager, Corporate Joint Use

EXHIBIT 3

Zito Media, L.P.
102 South Main Street
Coudersport, PA 16915

October 5, 2017

Stephen F. Schafer
Pennsylvania Electric Company
First Energy Services Company
Manager Joint Use & Cable Locating
76 South Main Street A-GO-11
Akron, OH 44308

Dear Stephen:

I write in response to your letter to me dated September 20, 2017 addressing attachment of Zito Media, L.P. ("Zito") facilities to Pennsylvania Electric Company ("Penelec") poles. As a preliminary matter, I find it curious that Penelec still is trying to "understand and appreciate" Zito's concerns. As you know, over the course of the last five years, Zito has clearly and repeatedly articulated concerns to Penelec regarding the delays and excessive, unsubstantiated engineering and make-ready expenses resulting from Penelec's hiring of a third party contractor, Sigma, to perform pre-construction survey work related to Zito's pole attachment applications north of I-80.

In fact, your letter acknowledges that Zito's request for more detailed information concerning the Sigma's charges for pre-attachment surveys and make-ready work was raised "several years ago" and that, nevertheless, the level of detail provided with Sigma's invoices still "falls short of a pole-by-pole, piece-by-piece accounting." In response to Zito's latest requests for additional cost detail, Penelec puts the onus on Zito to list the specific make-ready estimate details it desires and only commits to "pursuing opportunities to provide such details *where possible*." As we've discussed, governing Federal Communications Commission (FCC) rules require that pole survey and make-ready invoices include sufficient detail to allow attaching entities to discern whether charges are reasonable. Given the amount of time that has transpired already and Penelec's unwillingness to

require Sigma to provide additional billing detail in all cases, I see no other choice but to pursue resolution at the FCC.

Your responses to Zito's other concerns further convince me that FCC intervention is required at this time.

First, Zito has not, as you suggest, sought to compromise safe construction practices by insisting upon "drive by engineering." Instead, Zito has requested that Sigma incorporate Zito's input in joint ride-outs just as Penelec does in its territory south of I-80 where Sigma is not involved. I believe it is entirely reasonable to request that Zito be allowed to participate in the field survey and that information concerning the extent of required make-ready work be provided to Zito at that time, particularly when Zito is bearing the full expense of Sigma's services.

Second, while Sigma's average charges to produce make-ready estimates may have declined slightly over the past few months, the per pole charges are still excessive in comparison to similar charges by other Pennsylvania pole owners – in some cases by as much as 400 percent. Moreover, you have offered no process to guarantee that the charges will continue to decline or that they will not increase in the future.

Third, the fact that Penelec has reinstated the parties' Temporary Attachment Agreement based upon Zito's payment of Sigma's unsubstantiated and excessive make-ready estimates cannot be deemed to be a resolution in Zito's favor. Zito paid the invoices because it had no choice. That Penelec deems this a solution confirms that Penelec intends to continue with the status quo of requiring Zito to pay excessive, unsubstantiated charges or experience unacceptable deployment delays thereby jeopardizing its customer commitments.

Fourth, contrary to the assertions in your letter, Zito has provided requested examples of circumstances where pole replacements either could have been avoided or should not have been charged to Zito. Specifically, in an email to Bob Chumrick dated September 22, 2017, Kelly Ragosta provided photographs of 10 poles where suggested pole replacements appeared unnecessary, including 9 poles with only Penelec attached.

Finally, I take issue with your statement that executive level discussions between Zito and Penelec have not yet occurred. The July 25, 2017 meeting between the parties in Erie, attended by myself, as well as you, Bob Chumrik,

Deanna Dewitt, and Wallace Cunningham, on behalf of Penelec, and Ryan Hetrock on behalf of Sigma, clearly fulfilled this requirement.

Zito simply cannot afford to continue incurring undue delays and excessive charges any longer – it has regulatory obligations and customer commitments to fulfill. Given that Zito's attempts to informally reach resolution on these matters has not been productive, it has no choice but to move forward with the FCC's involvement.

Sincerely,

A handwritten signature in blue ink, appearing to read "James Rigas".

James Rigas, Co-President

Zito Media, L.P.